LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 15 1963
JOHN F. DAVIS, CLERK

In the Supreme Court
of the United States

No. 933

ART JOHNSTON,

Appellant,

v.

HUGH E. EARLE, WALTER B. SHANKS, IRWIN BORTHICK and IRVING H. CURRAN,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

WARDE H. ERWIN,
3323 S. W. Harbor Drive,
Portland, Oregon,
Attorney for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-63

INDEX

	Page
Official Reports of Decisions Below	1
Jurisdiction of This Court	2
Questions Presented for This Review	2
Constitutional or Statutory Provisions	4
Statement of the Case	5
Federal Jurisdiction in the Court of First Instance	6
Argument	6
Appendix	13
Opinion (District Court)	13
Opinion (U. S. Court of Appeals)	22

AUTHORITIES

Page

STATUTES:

Federal Rules of Civil Procedure (Rule 43 (a)) 8
Title 28, Sec. 1254 (1), U. S. Code, Act of June 25, 1948, C 646 (1), 62 Stat. 928 2
28 USCA 2680 (c) 1950 ed. 5
28 USCA 1442 (a) (1) 6

CASES:

Bershad v. Bood, 290 F.2d 714 at 719 4, 9
Douglas Dissent, Malone v. Bowdoin, page 652 10
Commissioner v. Duberstein, 363 U.S. 278 4, 8
Harkins v. Brundage, 276 U.S. 36 at 53 4
Johnston v. Earle, 245 F.2d 793 5
Keifer and Keifer v. Reconstruction Finance Corp., 306 U.S. 381 10
Land v. Dollar, 330 U.S. 731 at 738 4, 10
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 381 10
Malone v. Bowdoin, 369 U.S. 643 4, 10
U. S. v. U. S. Gypsum Co., 333 U.S. 365 at 394-5 8
U. S. v. Lee, 106 U.S. 196 at 219 4

TEXTS OR TREATISES:

34 Am. Jur. 352 8

In the Supreme Court
of the United States

No.

ART JOHNSTON,

Appellant,

v.

HUGH E. EARLE, WALTER B. SHANKS, IRWIN BORTHICK and IRVING H. CURRAN,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

Comes now your petitioner and petitions that a writ of certiorari issue from this court to the United States Court of Appeals for the Ninth Circuit to review the judgment entered in the above entitled case.

Official Reports of Decisions Below

The judgment of the District Court of the District of Oregon is unreported officially. The judgment is appended.

The judgment of the Court of Appeals of the United States for the Ninth Circuit is officially reported at 311 F.2d —. The opinion is appended.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals was dated on December 13, 1962, and petition for rehearing was denied on January 29, 1963. An order staying the mandate was entered on February 8, 1963.

Jurisdiction of this court is conferred by Title 28, Section 1254 (1) U. S. Code, Act of June 25, 1948, C 646 (1), 62 Stat. 928 as follows:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon petition of any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR THIS REVIEW

1. In this case no witness testified.

2. The entire record was presented by a transcript of previous testimony before another court.

3. There was, therefore, no test of credibility of any witness.

4. The cause was dismissed after 13 years of litigation (3 trials and 2 appeals).

5. The basis of dismissal was that the period of limitation had run by a few hours, although the same con-

tention had been previously rejected by at least three courts.

6. The transcript discloses that all witnesses (including government agents) was consistent that the date of seizure was on or after July 2, except in the case of a single witness.

7. The transcript of a single witness on which the court bases its decision testified (after 10 years) that he remembered the day was "Thursday."

8. His partner on whose notes the above witness relied to refresh his recollection stated it was "Friday."

9. Since the testimony of each witness was presented in transcribed form the statement of each are entitled to full credibility.

10. Where testimony of five witnesses was reported as to the date of seizure and three of these were consistent as being on or after July 2, and of the other two one was internally inconsistent in stating the date (July 1) but corrected to state the day ("Friday, that is"); the court is bounded to find in conformity with the clear and consistent majority, and a holding to the contrary would require invocation of the rule that the Supreme Court will not be bound by the fact that there was a scintilla of evidence, but will apply the rule that if the court is left with the definite and firm impression that the result would not meet common legal acceptance and was therefore clearly erroneous and reverse.

The questions presented in light of the above facts are:

A. Did the court of appeals err in not reversing the decision of the District Court as being clearly erroneous under the doctrine of *U. S.* v. *Gypsum Co.*, 333 U. S. 365 and *Commissioner* v. *Duberstein*, 363 U. S. 278 which question includes:

(1) Did the court err in refusing to apply the law as to burden of proof and clear and convincing evidence?

(2) Did the court of appeals really decline to determine the cause on its merits because of a conflict between its own decision in *Bershad* v. *Wood*, 290 F.2d 714 at 719 granting blanket and absolute immunity to Federal officers and this court's holding in the following cases?

Malone v. Bowdoin, 369 U. S. 643 (Decided while this case pending).
Larson v Domestic and Foreign Commerce Comp., 337 U. S. 682.
Land v. Dollar, 330 U. S. 731 at 738.
U. S. v. Lee, 106 U. S., 196 at 219

(3) Did the court refuse to follow the law relating to stenographically prepared evidence as stated in *Harkins* v. *Brundage*, 276 U.S. 36 at 53.

CONSTITUTIONAL OR STATUTORY PROVISIONS

"CONSTITUTION OF THE UNITED STATES
AMENDMENT IV

"*SECURITY FROM UNREASONABLE SEARCHES AND SEIZURES.*

"The right of the people to be secure in their persons, houses, papers and affects against unrea-

sonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

The recitation of facts used to present the questions presented are sufficient for the court's consideration of the statement of the case and will not be repeated here.

The history of this litigation should be exemplified. Plaintiff first proceeded against the United States under the Tort Claims Act in the U. S. District Court for the District of Oregon, and an opinion was entered in favor of plaintiff and against the United States but the case was dismissed since it was held the action was one arising out of the Internal Revenue Laws of the United States and was within an exception to that act (28 USCA 2680 (c), 1950 ed). The opinion suggested the agents might be liable. A second case was thereafter filed against the agents in the same court. The trial court held it had jurisdiction but held the defendants were immune from liability. The court of appeals for the Ninth Circuit held it did not have jurisdiction (245 F.2d 793) and reversed for dismissal. This action was then brought against the agents in the State Court of Oregon, and the case was removed back to the U. S. District Court of Oregon. That court on this occasion held that the action was barred by the period of limitation. The court of appeals for the Ninth Circuit affirmed. This petition followed.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This was a civil action for conversion of a tractor—the action was filed in the Circuit court of the State of Oregon, for the County of Multnomah; but was removed to the United States District Court since at the time of the alleged tort the appellees (defendants below) were employees of the Internal Revenue Service.

Jurisdiction was based on 28 USC § 1442 (a) (1).

ARGUMENT

Petitioner contends:

(1) If the record indicates that a clearly erroneous result has been reached by a trial court, the Supreme Court will not be bound by the trial court's decision even if there is some evidence to support the finding.

(2) The only evidence in support of the court's finding was found in the transcript of one party defendant to this action whose testimony was hazy after ten years as to the date of the seizure. His transcript did show the one statement upon which the court seized:

> "Q. What was your part in the removal?
> A. Well, after refreshing my recollection, I remember that on a Thursday morning. . . . the only way I can say the date would be July 1st was from the Borthick's daily reports on which he mentions my name. . . ."

The court held that his statement of the DATE was inadmissible and it was erroneous to admit that state-

ment but seized on the DAY (Thursday) as being the result of this lone witnesses' independent recollection (see Opinion).

However, the notes to which the witness referred for refreshment of his recollection in the above quotation were as follows (Tr. 129):

> "Found cat but was unable to start; took carburetor and extension off crank. FRIDAY NIGHT THAT IS." (Emphasis added)

Thus, the two defendants who testified on the subject were opposed to each other—one said Friday—one Thursday. They were both former government employees, both defendants. If either were to be believed, one over the other, the one testifying from his notes should be the stronger—he stated "Friday."

It is true, he also stated July 1st, but his notes carefully corrected that to show "Friday night, that is."

Two other witnesses, one a government agent in another trial, agreed the actual seizure (removal of the tractor) occurred on the 3rd of July (Tr. 63).

The plaintiff likewise so testified (Tr. 13).

An independent witness with no connection to the parties who observed the act testified to the same effect (Tr. 64).

The score therefor of witnesses entitled as a matter of law to equal and full credibility was 4 to 1.

The burden of proof to prove the running of the period of limitations must be carried by clear and con-

vincing evidence and the burden of so proving is on the defendants.

34 Am. Jur. 352.

Petitioners contended the holding of the court below that the period of limitations had run was clearly erroneous under the circumstances of this case and a reviewing court could scarcely help from being left with a "definite and firm conviction that a mistake had been committed."

U. S. v. U. S. Gypsum Co., 333 U. S. 365 at 394-5 and *Commissioner v Duberstein*, 363 U. S. 278, both so hold.

A finding would be "clearly erroneous" if it did not meet "common legal acceptance."

The holding of the court of appeals that the Federal Rules of Civil Procedure (Rule 43 (a)) permits the court to consider the transcript of the only witness to support the courts' finding as opposed to the Oregon statute would appear erroneous but is probably not the vital issue since the holding under the present circumstances of a "transcribed trial" and independency and consistency of all other witnesses numerically outweighing the believed party by a ratio of 4 to 1 on a matter where the burden of proof by clear and convincing evidence is on defendants would seem to be clearly erroneous, irrespective of the application of the Oregon statute.

DID THE COURT OF APPEALS REALLY DECLINE TO DETERMINE THE CAUSE ON THE MERITS BECAUSE OF A CONFLICT BETWEEN A DECISION IN ITS OWN JURISDICTION WITH THOSE OF THIS COURT?

On appeal to the court of appeals for the Ninth Circuit, both the Government and the plaintiff indicated a willingness to have the court determine the matter on the merits without reversing.

The trial court had avoided a determination on the merits by holding the period of limitation had run and accordingly the appellate court would normally (in the event of a reversal) have been obliged to remand for a determination on the merits.

Since the entire matter was submitted in the trial court on a printed record, counsel for plaintiff suggested in his opening brief that the appellate court could determine the cause on its merits without reversal in order to secure final determination on the merits. The suggestion was adopted by counsel for the government who briefed the question of sovereign immunity in its answering brief as did the appellant in his reply brief. The case was extensively and almost exclusively argued to the appellate court on the question of "immunity" of the defendants.

Neither side argued the question of the period of limitations extensively. There exists in the Ninth Circuit a serious conflict between the case of *Bershad* v. *Wood*, 290 F.2d 714, which seems to grant blanket immunity to all Federal agents and which adopted a doctrine that

modern concepts of law required such a rule (719) and this court's cases of *Malone* v. *Bowdoin*, 369 U. S. 643, *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 and *Land* v. *Dollar*, 330 U. S. 738, which adopts the rule that sovereign immunity is an "archaic hangover not consonant with modern morality." (From *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U. S. 681 at 703).

This court has stated (*Douglas Dissent*, *Malone* v. *Bowdoin*, page 652)

> "Sovereign immunity has become more and more out of date as the powers of the government and its vast beauracies have increased." Citing *Keifer and Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381.

In conformity with principles set forth in the *Malone* and *Keifer* cases, the doctrine of sovereign immunity should now be examined and decided and it should be done in a strong clear-cut factual case.

This case is clearly of that type. Agents here attempted the seizure, although knowing the owner of the tractor was not indebted in any way to the government (Tr. 130-143). The owner sought the protection of the United States Attorney, and the defendants had received an independent admonition from the United States attorney not to make the seizure (Tr. 72-3-4), but they chose to disregard the advice, of a competent and independent branch of the government, and in spite of the independent admonition seized plaintiff's tractor.

Because this is such a flagrant case of violation of the

Constitutional protection of civil rights, the American Bar committee on liens has followed this case.

The case has received wide and continuous attention in local publications and periodicals and has received a national report in NEWSWEEK MAGAZINE. The cause is one embracing timely and wide national interest and basic public policy involving civil rights and the existing conflict between this court and the court to which this petition is directed should be resolved.

The petition should be granted on the transcript without argument in this case directing the U. S. Court of Appeals for the Ninth Circuit to hear and determine the cause on its merits or because the evidence was presented on trial in stenographically reported form, the case should be heard on the merits to determine sovereign immunity of federal officers and the right of a citizen to be secure in his property under the IVth Amendment to the Constitution of the United States.

Respectfully submitted.

WARDE H. ERWIN,
Attorney for Petitioner.

APPENDIX

OPINION

East, D. J.

Parties

The plaintiff Art Johnston (Johnston) has been at all times pertinent to this action and is now a citizen of the State of Oregon. The defendant Hugh E. Earle was at all times herein mentioned since September 1, 1947, the duly qualified and acting Collector of Internal Revenue for the District of Oregon and as such was a Federal officer; that defendant Walter B. Shanks was at all times herein mentioned, duly acting and qualified Chief Field Deputy in charge of Deputy Collectors of Internal Revenue for the District of Oregon and as such was a Federal officer; that defendants Irwin Borthick and Irving H. Curran were each duly acting and qualified Deputy Collectors of Internal Revenue for the District of Oregon and as such were Federal officers and were at all times herein mentioned after September 1, 1947, acting under direction of Walter B. Shanks, who was acting under authorization of Hugh Earle, and each of said defendants have been at all times pertinent to this action and are now citizens of the State of Oregon.

Posture of Instant Case

On July 29, 1957, Johnston filed his complaint against the above-named defendants in the Circuit Court of the State of Oregon for Multnomah County, wherein he alleged, inter alia:

> "That on or about the 10th day of July, 1948, he was the owner of and entitled to the possession of a D-8 Caterpillar tractor, Motor No. 1H-4589"

(Cat), and as successor in ownership of Earl L. Marshal (hereinafter mentioned taxpayer), and, further:

> "That on or about the said date of July 10, 1948, in the County of Clackamas, State of Oregon, the defendants, Irwin Borthwick, Irving H. Curran, Walter S. Shanks, and Hugh E. Earle did unlawfully take, seize, and carry away the said caterpillar tractor and convert the same to their own use and benefit, and that the same was done against the will and without the consent of the said plaintiff."

On August 7, 1957, this cause was removed from the said state court to this Court on the petition of the defendants.

Jurisdiction

This Court has jurisdiction of the subject matter and of the parties. Title 28 U.S.C.A. § 1442(a)(1).

[Footnotes are set out at end of this Opinion.]

History of This Litigation

Since July 5, 1949, Johnston has been applying to the courts hereinafter referred to for an adjudication on the merits of his claim for alleged damages arising from the aforesaid alleged conversion of his Cat, all to no avail.

It seems almost incredible that more than 12 years has so elapsed. Nevertheless, that is the record. On July 5, 1949, Johnston brought an action in this Court, being Civil No. 4978, against the United States of

America under the Federal Torts Claims Act, Title 28 U.S.C.A. § 1346, and Title 28 U.S.C.A. §§ 2671, 2674. Johnston's complaint in that case sounded generally in trespass; however, negligence on the part of the defendants was also alleged, all in connection with his contended unlawful seizure of his Cat by the individual Internal Revenue officials "some time in July, 1948."

On December 12, 1952, by order of the late James Alger Fee, the then Chief Judge of this Court, Johnston's cause was dismissed with prejudice because of the lack of jurisdiction on the part of this Court. Title 28 U.S.C.A. 2680(c). Thereafter, and on July 2, 1954, Johnston brought an action in this Court, Civil No. 7571, against the identical Internal Revenue officials named as defendants in this cause, individually. In that cause Johnston sought to recover alleged damages arising out of the claimed July, 1948, conversion of his Cat as aforesaid. After a hearing on the merits, the late Claude McColloch, then the Chief Judge of this Court, held that this Court had jurisdiction; however, that Johnston

> "* * * could not recover on his complaint that defendants had tortiously seized and converted to their own use a caterpillar tractor belonging to Johnston, because the evidence failed to show they were not entitled to do so in their official capacities as federal revenue officers acting in a federal tax levy."

Johnston appealed from that judgment to the Court of Appeals for the Ninth Circuit, and that Court held that the controlling issue was one of jurisdiction of the District Court and found it wanting under any theory

of recovery advanced by Johnston. The Court of Appeals opined and concluded, on February 18, 1957, that:

> "The recovery sought [in the District Court] is solely for a *state* tory by one citizen of the state against other citizens of the same state." 245 F.2d 793, 795 [immunity]. [Italics supplied.]

and

> "In fine, the federal government has created no cause of action enforceable in its courts for such torts under the state law, and hence the district court here lacked jurisdiction of the subject matter.
>
> "Judgment is reversed, and the district court ordered to enter an order dismissing the action for failure to state a claim arising under the laws of the United States." At p. 796.

Upon the mandate of the Court of Appeals, this Court dismissed this action for lack of jurisdiction on June 3, 1957.

Posture of This Action

Johnston, on July 29, 1957, instituted this action in the Circuit Court of the State of Oregon for the County of Multnomah, which as stated above was removed to this Court on August 7, 1957.

Under date of August 16, 1957, the defendants moved to dismiss the action, which motion was overruled on September 10, 1957. Thereafter, on March 21, 1958, the defendants moved for summary judgment against Johnston pursuant to Rule 56(b) F.R.Civ.P., which motion was overruled (see Court's opinion, reported in 162 F. Supp. 149).

Thereafter, defendants, on May 12, 1958, filed herein their answer, consisting of denials and two alleged affirmative defenses.

On April 13, 1959, the parties subscribed to and lodged herein a pretrial order which was approved by the Court on April 14, 1959. Thereafter, by stipulation of counsel for the parties, such evidence was submitted to the Court as they respectively desired, by re-reading into the record herein such testimony of certain witnesses appearing and testifying in this Court in the aforesaid Civil case No. 7571. The transcript of that testimony was transcribed and filed herein on October 25, 1960. The matter was again submitted to the Court on the merits after oral argument of counsel on February 27, 1961.

In the pretrial order, the plaintiff set forth some 13 contentions of fact and law for recovery, and the defendants set forth some 21 contentions of fact and law against recovery. There are but three issues of law to be concluded or adjudicated by the Court:

"1. Is this action barred by the statute of limitation?

2. Was the taking, seizing and detaining of the tractor from plaintiff's possession wrongful so as to make defendants liable to plaintiff for the value of the tractor?

3. What was the value of the tractor at the time of seizure?"

Discussion

It appears from the agreed facts of the pretrial order, inter alia, that:

"1. (a) On September 7, 1945, the Commissioner of Internal Revenue assessed against Earl L. Marshal, dba Marshal Logging Company, Blue River, Oregon, Withholding Federal taxes for the second quarter of 1945, penalty and interest totaling $1,260.00.

(c) On October 20, 1945, a Notice of Federal Tax Lien, No. 12609, was filed in the Office of the County Clerk for Lane County, Oregon.

2. (b) On October 17, 1945, J. W. Maloney, then Collector of Internal Revenue for Oregon, issued a statutory warrant for distraint, commanding a levy and sale of all property rights to property belonging to Earl L. Marshal or property on which a federal tax lien existed."

The Court is of the opinion and finds from a preponderance of all of the evidence in the case that on July 1, 1948, defendants Borthick and Curran, together with Robert Ellison of the Internal Revenue Service, located the tractor near Colton, Clackamas County, Oregon, and made a levy upon that tractor pursuant to the aforesaid warrant for distraint, placed seizure tags thereon and, to insure that it would not be moved, removed the carburetor and crank extension.

That on July 2, 1948, defendants Currant and Borthick returned and the Cat was loaded on carrying equipment of Holman Transfer Co. and was Transported to Portland, Oregon, on a trip commencing July 2, interrupted by breakdown, and concluded on July 3, 1948.

While this Court might well be of the opinion that

said seizure was wrongful and unlawful on the part of the defendants because of the alleged invalidity of the Government's lien, and will, for the purposes of this opinion, assume it to have been such; nevertheless, such is of no avail to Johnston. The Oregon statute of limitations contended for and asserted as an affirmative defense on the part of the defendants is O.R.S. 12.080, which provides:

> "(4) An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof; shall be commenced within six years."

O.R.S. 15.020 provides:

> "Action shall be commenced by filing a complaint with the clerk of the court. Any time after the action is commenced the plaintiff or his attorney may issue as many original summonses as either may elect and deliver one of such summonses to the sheriff of each county in which service on any defendant is desired."

Rule 3 of F.R.Civ.P. reads:

> "A civil action is commenced by filing a complaint with the court."

It is self-evident that no action at law was "commenced" by Johnston against any of the defendants in any Federal or state court within the State of Oregon until the commencement of the aforesaid Civil Action No. 7571 in this Court on July 2, 1954, more than six years after the alleged conversion of Johnston's Cat by the defendants. These proceedings were originally instituted in the Circuit Court of the State of Oregon for Multnomah County on July 29, 1957, and within one year after the

dismissal of Johnston's Civil Action No. 7571 in this Court on June 3, 1957, and the plaintiff has received the benefit of the Oregon savings-clause statute. O.R.S. 12.220.[3]

Conclusion

Therefore, this Court concludes that the defendants have sustained their affirmative defense of the running of the applicable Oregon statute of limitations, and Johnston's alleged cause of action against each of the defendants for alleged conversion is barred and that the defendants are entitled to judgment in their favor and against Johnston.

That by reason of the foregoing conclusion and adjudication of issue No. 1, it is not necessary for this Court to deal with the aforesaid issues 2 and 3, contained in the pretrial order herein.

This opinion shall stand as the Court's findings of fact and conclusions of law as to issue No. 1 of the pretrial order, pursuant to Rule 52(a) F.R.Civ.P.

Counsel for the defendants is requested to submit appropriate judgment order within 10 days.

Dated September 19, 1961.

Footnotes

[1] "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency

thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

[2] Johnson vs. Earle, 245 F.2d 793.

[3] 34 Am. Jur. Lim. of Act., § 283, and cases cited.

[Endorsed: Filed September 19, 1961.]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ART JOHNSTON, *Appellant*,	)	
vs.	)	No. 17,715
HUGH E. EARLE, WALTER B. SHANKS, IRWIN BORTHICK and IRVING H. CURRAN, *Appellees*.	)	Dec. 13, 1962

Appeal from the United States District Court for the District of Oregon.

Before MAGRUDER, MERRILL and BROWNING, Circuit Judges.

PER CURIAM:

This is a civil action for conversion of a tractor. The action was filed in the Circuit Court of the State of Oregon for the County of Multnomah, but was removed to the United States District Court since at the time of the alleged tort the appellees (defendants below) were employees of the Intrnal Revenue Service. See 28 U.S.C.A. § 1442(a)(1).

The case was tried to the court sitting without a jury. Appellees contended that the action was barred by the statute of limitations. This turned upon whether the conversion occurred on July 1, 1948, or on July 2, 1948 or thereafter. The court found "from a preponderance of all of the evidence in the case that on July 1, 1948 . . . [the appellees] located the tractor near Colton, Clackamas County, Oregon, and made a levy upon that tractor pursuant to the aforesaid warrant for distraint, placed seizure tags thereon and, to insure that it would

not be moved, removed the carburetor and crank extension." The court further found that on July 2, 1948, two of the appellees returned, loaded the tractor on carrying equipment, and removed it. The court concluded that the action was barred.

The court's finding that the conversion occurred on July 1st was sound in law and supported by substantial evidence. Appellant was effectively deprived of the essential advantages of possession (and his cause of action for conversion therefore occrued) when appellees affixed the notice of seizure and immobilized the tractor by removing its carburetor and crank extension, even though the tractor was not carried away until the following day. See *Restatement, Torts* §§ 221-23, and comment "c" to § 221 (a) (1934); *Prosser, Torts* § 15 at 71 and n. 71 (2d ed. 1955). As appellant points out, there was a direct conflict in the testimony as to the date upon which these acts of conversion occurred, and the testimony of an important defense witness was internally inconsistent (the witness referred to the date both as July 1st and as Friday, although July 1, 1948 fell on a Thursday). But it is the function of the trier of fact to resolve just such conflicts and ambiguities, and we are satisfied upon a reading of the whole record that the finding of the District Court that the seizure occurred on July 1, 1948 was not clearly erroneous.

One of the witnesses testified that after examining certain notes to refresh his recollection he remembered that the events occurred on Thursday. He testified, "The only way I can say the day would be July 1st" was

from the notes themselves. Appellant contends that the testimony should have been stricken because the notes to which Curran referred were not made by the witness, were only copies of original notes previously destroyed, and assertedly contain matter inconsistent with the witness's testimony.

Since after the attempt to refresh his recollection the witness still had no independent recollection of the date, his testimony that the date was July 1st was not admissible. However, his testimony that the events occurred on Thursday was based upon his own memory, and it was not rendered inadmissible by the nature of the notes which he examined to refresh his recollection. The federal rule recognizes few if any limitations upon the kind of material that may be used to refresh recollection, as distinguished from that which may be offered as a "record of past recollection" in proof of the facts recited. See *Jewett v. United States*, 15 F.2d 955 (9th Cir. 1926); *Hoffman v. United States*, 87 F.2d 410, 411 (9th Cir. 1937). We need not inquire whether, as appellant suggests, the rule followed in the Oregon courts is to the contrary. See Rule 43 (a), Fed. R. Civ. P. Although Curran's testimony as to the date should have been stricken, the error was harmless in view of the same witness's admissible testimony that the critical events occurred on Thursday for, as we have said, the Thursday in question was in fact July 1st.

Affirmed.

(Endorsed) Per Curiam Opinion Filed Dec. 23, 1962.

Frank H. Schmid, Clerk.